

The Special Administrative Law Judge found claimant entitled to permanent partial general disability benefits for a seven and one-half percent (7.5%) functional impairment to the body as a whole due to a neck injury. However, the Special Administrative Law Judge denied claimant's request for benefits for alleged brain damage or psychological disorder. The claimant requests the Appeals Board to review that finding. The respondent requests the Appeals Board to review the finding of nature and extent of disability. Those are the sole issues now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Special Administrative Law Judge should be affirmed. Claimant should receive benefits for permanent injury to his neck, but should be denied benefits for alleged brain damage or psychological problems.

(1) The Appeals Board agrees with the Special Administrative Law Judge that claimant is entitled to benefits for permanent injury to his neck resulting from his work-related accident on March 23, 1991. The Special Administrative Law Judge found that claimant has sustained a seven and one-half percent (7.5%) impairment of function to the body as a whole based upon the testimony of board-certified orthopedic surgeon Edward J. Prostic, M.D. Although the record contains evidence that claimant has no impairment as opined by orthopedic surgeon Randall Hendricks, M.D., the Appeals Board adopts the finding of the Special Administrative Law Judge as it is reasonable when considering the record as a whole.

The Appeals Board agrees with the Special Administrative Law Judge that claimant's neck injury has not resulted in permanent work restrictions or limitations upon his ability to perform work in the open labor market or earn comparable wages. Therefore, claimant is entitled permanent partial general disability benefits for functional impairment as provided by K.S.A. 1990 Supp. 44-510e. This statute provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment."

(2) The Appeals Board agrees with the Special Administrative Law Judge that claimant has failed to sustain his burden of proving it is more probably true than not that claimant has sustained either brain damage or psychological disorder as a result of his injury at work.

Claimant bears the burden of proof to establish his claim. Burden of proof is defined in K.S.A. 1990 Supp. 44-508(g) as ". . . the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is:

" . . . on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." K.S.A. 1990 Supp. 44-501(a).

Claimant presented testimony from neurologist Sander L. Glatt, M.D., who believes claimant has neuropsychological deficits consistent with change from damage that might have occurred as a result of a head injury. However, the doctor admits he can only presume the deficits were caused by the accident at work because he assumed claimant did not have difficulties before the accident. As indicated below, the Appeals Board finds that assumption to be untrue.

Claimant also presented the testimony of psychologist Minnie R. Koresko, Ph.D. Although she testified claimant has some cerebral dysfunctioning to a mild degree, she cannot determine whether it was caused by traumatic injury as opposed to some disease process. She also testified that assuming claimant was functioning normally prior to the head injury, it would be reasonable to attribute claimant's problems to that accident.

The Appeals Board finds the opinions of Doctors Glatt and Koresko fail to carry claimant's burden of proof as they were based upon an incomplete history. Both doctors assumed claimant was functioning normally before the accident which, in fact, is not true as indicated by the record. Doctors Glatt and Koresko did not have claimant's true history.

The Appeals Board finds the opinions of psychiatrist Warren G. Phillips, M.D., and clinical psychologist William A. O'Connor, Ph.D., to be the more persuasive, and, therefore, finds claimant's symptoms of brain damage and psychological disorder to be unrelated to his accident at work. Because these doctors had a more accurate history, their opinions are given greater weight.

The Appeals Board adopts the findings and conclusions of the Special Administrative Law Judge that are not inconsistent with those expressly set forth herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey entered in this proceeding on August 1, 1994, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Carlton W. Kennard, Pittsburg, KS
John I. O'Connor, Pittsburg, KS
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director